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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

MICHAEL W. FITZGIBBONS, Plaintiff and Respondent, v. INTEGRATED HEALTHCARE HOLDINGS, INC., Defendant and Appellant.	G041374 (Super. Ct. No. 30-2008-00108081) O P I N I O N

Appeal from an order of the Superior Court of Orange County, Gregory H. Lewis, Judge. Affirmed.

Enterprise Counsel Group, David A. Robinson, Benjamin P. Pugh and Timothy M. Kowal for Defendant and Appellant.

Law Offices of Donald K. Hufstader and Donald K. Hufstader for Plaintiff and Respondent.

* * *

A holding company, formed to acquire and operate a hospital, appeals from an order that denied its special motion to strike three causes of action in a complaint by one of its doctors. The doctor alleged that the holding company conspired to frighten and intimidate him in retaliation for his views on hospital policies and practices, made false police reports, and aided and abetted in the malicious planting of a handgun in his vehicle which led to his arrest.

We affirm the order denying the special motion to strike because the action does not arise from protected activity under California's anti-SLAPP statute (Code Civ. Proc., § 425.16).[1] The principal thrust or gravamen of each of the subject causes of action arises from noncommunicative acts and other nonprotected activity. At most, the allegations involving protected free speech or petitioning activity are incidental to unprotected acts.

I

FACTUAL AND PROCEDURAL BACKGROUND

In determining whether a cause of action is based on a defendant's protected free speech or petitioning activity, we look to the pleadings and the supporting and opposing declarations stating the acts upon which the liability is based. (§ 425.16, subd. (b); *Navellier v. Sletten* (2002) 29 Cal.4th 82, 89 (*Navellier*); *Gilbert v. Sykes* (2007) 147 Cal.App.4th 13, 26 (*Gilbert*); *Brill Media Co., LLC v. TCW Group, Inc.* (2005) 132 Cal.App.4th 324, 330.) We describe the evidence with this principle in mind.

Defendant Integrated Healthcare Holdings, Inc., (IHHI) owns and operates Western Medical Center, an acute care hospital and trauma center in central Orange County. Plaintiff Michael Fitzgibbons (Fitzgibbons) is a doctor at the hospital, a former member of its medical executive committee and a former chief of staff.

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[1] "SLAPP" is an acronym for "strategic lawsuit against public participation." (See *Episcopal Church Cases* (2009) 45 Cal.4th 467, 473, fn. 1 (*Episcopal*).) All further statutory references are to the Code of Civil Procedure, unless otherwise noted.

A. *The First Lawsuit*

On May 19, 2005, Fitzgibbons sent a confidential e-mail to medical executive committee members and other individuals expressing concern about IHHI's financial ability to operate the hospital. On June 5, 2005, Fitzgibbons sent a second confidential e-mail about the hospital's patient care, safety, and financing to IHHI's chief executive officer, with copies to various hospital executives, a medical staff attorney, and a state senator. Within weeks, IHHI sued Fitzgibbons for defamation, breach of contract, and intentional interference with contractual relations.

Fitzgibbons denied the allegations in the complaint and filed a special motion to strike under California's anti-SLAPP statute (§ 425.16). His legal position drew the support of two major physicians' groups, the California Medical Association and the American Medical Association.

Fitzgibbons claimed that he became a "major target of retaliation" because of his perceived hostility to IHHI. IHHI failed to renew his ongoing contract to provide infection control services as an infectious disease specialist and refused to pay him for infection control services he performed. According to Fitzgibbons, trauma surgeons at the hospital "were reluctant to continue to consult me" and "reduced [their] consultations to near zero."

In *Integrated Healthcare Holdings, Inc. v. Fitzgibbons* (2006) 140 Cal.App.4th 515 (*Integrated*), we reversed the trial court's order denying Fitzgibbons's anti-SLAPP motion because the e-mails were of widespread public importance. "IHHI's acquisition and operation of [Western] was the subject of public hearings . . . and numerous articles [that] focused on IHHI's financial ability to successfully operate the hospitals, and the potential harm to the public should IHHI fail. Fitzgibbons's e-mail message expressing concern for IHHI's financial health and its ability to operate WMC falls squarely within these issues." (*Integrated,* at p. 524.) We held that IHHI had failed to demonstrate a probability of prevailing on the merits on any

of its claims. Consequently, we directed the trial court to enter an order dismissing the lawsuit in its entirety.

B. *The Handgun Incident*

On June 28, 2006, 10 days after we published our opinion in *Integrated*, the police received three anonymous 911 telephone calls "regarding a male brandishing a firearm on another vehicle over a road rage incident." The caller gave the police the license plate number to Fitzgibbons's vehicle and stated that he followed it to the hospital's doctors' parking lot.

Two Santa Ana police officers met Fitzgibbons in the hospital cafeteria. They described him as "cooperative," and he consented to a search of his car. The police officers found a loaded black semi-automatic handgun and a pair of dark cloth gloves hidden underneath the front driver's seat. Fitzgibbons denied brandishing, possessing, or owning a handgun, and said "he was being set up and that this was for retaliation for winning a civil law suit against the hospital." He was arrested for gun-related charges and booked into the Santa Ana jail.

The police were unable to contact the male caller who made the 911 telephone call, which turned out to be initiated from a prepaid telephone calling card, without any name or address associated with it.

A DNA test on the gloves showed Fitzgibbons to be "excluded as a contributor." There was insufficient DNA on the handgun for testing. No criminal charges were filed against Fitzgibbons because of insufficient evidence.

C. *The Current Lawsuit*

In June 2008, Fitzgibbons filed a complaint against IHHI, seeking damages for (1) intentional interference with prospective economic advantage, (2) defamation, (3) intentional infliction of emotional distress, and (4) malicious prosecution.

The complaint specifically alleges that IHHI "made a false report to 911 and the Santa Ana Police Department that Plaintiff had brandished a hand-gun in an alleged road-rage incident; and/or made intentionally false statements about Plaintiff which cast him in a false light with respect to his arrest."

IHHI filed a special motion to strike all the causes of action except for the cause of action for malicious prosecution. Fitzgibbons opposed the motion with evidence that a former IHHI executive witnessed his arrest from a nearby window, gestured down to the parking lot and stated, "'People don't know how powerful I am.'"

IHHI now appeals from the trial court's denial of its special motion to strike. IHHI also filed a separate SLAPPback motion for Fitzgibbons's cause of action for malicious prosecution. (See § 425.18, subd. (b)(1), for a statutory definition of "SLAPPbacks.") The trial court denied this motion as well, but it is not part of this appeal.

III

DISCUSSION

A. *We Apply the "Principal Thrust or Gravamen" Test to Determine Whether IHHI Has Met Its Burden to Show the Targeted Action Arises from Protected Activity*

The anti-SLAPP statute protects litigants from lawsuits brought primarily to chill one's constitutional right to petition the government to redress grievances and to speak freely in matters of public interest. (§ 425.16, subd. (a).) Defendants must make a threshold showing that the challenged cause of action is one "arising from" protected activity. (§ 425.16, subd. (b)(1).) "While a defendant need only make a prima facie showing that the underlying activity falls within the ambit of the statute, clearly the

statute envisions that the courts do more than simply rubber stamp such assertions before moving on to the second step." (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 317 (*Flatley*).) If the defendants meet this first prong, then the burden shifts to the plaintiffs to demonstrate a probability of prevailing on the claim. (*Integrated, supra,* 140 Cal.App.4th at p. 522.)

IHHI and Fitzgibbons devote much of their briefs to whether the trial court applied the correct test to the first prong for so-called "mixed" causes of action involving both protected and unprotected activity. According to IHHI, the trial court erred by broadly looking to the principal thrust or gravamen of the complaint as a whole rather than taking a narrower view, "on a cause-of-action-by-cause-of-action basis," to determine whether "*any* protected activity is at stake." (Italics added.) IHHI faults the trial court for "unwittingly" following a "rogue" case, *Wang v. Wal-Mart Real Estate Business Trust* (2007) 153 Cal.App.4th 790, which, in IHHI's view, is "unmoored to any statutory or case law." IHHI further contends that another leading case, *Martinez v. Metabolife Internat., Inc.* (2003) 113 Cal.App.4th 181, 188 (*Martinez*) goes "beyond the statutory text and legislative intent" of the anti-SLAPP statute.

We engage in a de novo review of the trial court's ruling to deny the special motion to strike. (*Integrated, supra,* 140 Cal.App.4th at p. 521.) Because we exercise our independent judgment in reviewing the record (*Sycamore Ridge Apartments LLC v. Naumann* (2007) 157 Cal.App.4th 1385, 1396), we need not concern ourselves with how or why the trial court came to its result, only with whether its resolution is legally correct.

Unlike the trial court, we have the benefit of two recent decisions of our Supreme Court on the subject of so-called "mixed" causes of action. These decisions, which issued after the trial court's anti-SLAPP hearing, apply the "principal thrust or gravamen" test to determine whether a cause of action is based on protected activity. (*Episcopal, supra,* 45 Cal.4th at pp. 477-478; see also *Club Members for an Honest Election v. Sierra Club* (2008) 45 Cal.4th 309, 319 ["The 'principal thrust or gravamen'

test has been used to determine whether an action fits within the scope of the anti-SLAPP protection provided by section 425.16 when a pleading contains allegations referring to both protected and unprotected activity"].) Both decisions cite *Martinez. supra*, 113 Cal.App.4th at page 188, a case which IHHI has implored us not to apply, as the source for this "principal thrust or gravamen" test. If ever there was a real split in intermediate appellate authority, the Supreme Court has resolved the matter.[2]

In *Episcopal, supra,* 45 Cal.4th at pp. 477-478, a parish church sought to apply the anti-SLAPP statute to a lawsuit brought by the general church to regain ownership and possession of the local church building. The local church argued that the causes of action involved protected activity regarding an act in furtherance of free speech on a public issue regarding church governance. The Supreme Court, while recognizing that protected activity "arguably lurks in the background of this case" (*Episcopal,* at p. 473), held that the anti-SLAPP statute did not apply because a property dispute "and not any protected activity, is 'the gravamen or principal thrust' of the action." (*Episcopal,* at p. 477.) "The additional fact that protected activity may lurk in the background — and may explain why the rift between the parties arose in the first place — does not transform a property dispute into a SLAPP suit. Accordingly, the trial court erred in treating this as a SLAPP suit subject to section 425.16's special motion to dismiss." (*Id.* at p. 478.)

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[2] In reality, as IHHI's counsel himself stated at oral argument, we doubt there is any conflict in the decisional law other than a disagreement about terminology. In *Salma v. Capon* (2008) 161 Cal.App.4th 1275, the court, while declining to expressly adopt the principal thrust or gravamen formulation (*Id.,* at p. 1288, fn. 5), nonetheless recognized that the anti-SLAPP statute does not apply to allegations of protected conduct that are "merely incidental" to unprotected acts. (*Salma,* at p. 1288.) Stated otherwise, where the principal thrust or gravamen of the cause of action rests on unprotected conduct, inclusion of incidental references to protected acts is not enough to invoke the statute.

The Supreme Court has further explained that "[t]he anti-SLAPP statute's definitional focus is not the form of the plaintiff's cause of action but, rather, the defendant's *activity* that gives rise to his or her asserted liability— and whether that activity constitutes protected speech or petitioning." (*Navellier, supra,* 29 Cal.4th at p. 92.) A court considering a special motion to strike must examine the allegedly wrongful conduct itself, without particular heed to the form of action within which it has been framed. (*Id.* at pp. 92-93.)

In the following sections, we apply the "principal thrust or gravamen" test and explain why IHHI's alleged activities do not involve protected speech or petitioning in any of the three causes of action at issue in this appeal.

B. *The Allegations That IHHI Participated in a Conspiracy to Plant Evidence and Falsely Charge Fitzgibbons with a Crime Do Not Involve Protected Activities*

The handgun incident in the hospital parking lot stands at the heart of the instant lawsuit. It underlies each of Fitzgibbons's three causes of action for intentional interference with prospective economic advantage, defamation, and intentional infliction of emotional distress. In the cause of action for the interference tort, for example, Fitzgibbons alleges that he lost medical business and opportunities by IHHI's activities in "aiding and abetting the malicious planting a hand-gun in Plaintiff's car leading to his arrest following an anonymous '911' call alleging that [a] man was brandishing a weapon in a fit of road rage . . . ." This same incident underlies Fitzgibbons's defamation cause of action as well; he alleges that IHHI's comments regarding his arrest were slanderous per se "since they imputed to Plaintiff criminal conduct." And even IHHI concedes that the emotional distress claim is "based presumably on Fitzgibbons'[s] gun possession arrest . . . ."

IHHI argues that any 911 calls to the police involve protected free speech activity "and presumptively fall within the scope of section 425.16, and specifically section 425.16, subdivision (e)(2) (petitioning an executive body)." IHHI characterizes

its alleged communications as being "intended to trigger an investigation into possible criminal activity."[3]

IHHI relies upon *Chabak v. Monroy* (2007) 154 Cal.App.4th 1502. In *Chabak,* the Court of Appeal applied the anti-SLAPP statute to a physical therapist's defamation action against a former patient for filing a false police report about touching her inappropriately during a physical therapy session. "[The patient's] statement to the police arose from her right to petition the government and thus is protected activity." (*Chabak,* at p. 1512.)

IHHI ignores, however, the well-recognized distinction between pure *communication* — which may be protected as a petition to a government body and *conduct*, which is not. "As our Supreme Court has made clear, there is a distinction between injury arising from (privileged) communicative acts and injury arising from (nonprivileged) noncommunicative acts." (*Wang v. Hartunian* (2003) 111 Cal.App.4th 744, 750-751 (*Hartunian*); "[B]y its very terms, [the anti-SLAPP statute] does not apply to activity that is not in furtherance of the constitutional rights of free speech or petition . . . ." (*Flatley*, *supra*, 39 Cal.4th at p. 324; see also *Hagberg v. California Federal Bank* (2004) 32 Cal.4th 350, 374, original italics (*Hagberg*) [distinguishing between protected pure *communication* and unprotected "malicious *conduct* of a citizen that aided or promoted a peace officer's unlawful arrest"].)

In *Hartunian, supra,* the Court of Appeal held that a citizen's arrest is not considered protected activity for purposes of a SLAPP motion. Notwithstanding any reports by the arresting defendants of the alleged crime to the police, they crossed the "the line between communication and conduct" when they filled out the citizen's arrest form. (*Hartunian, supra,* 111 Cal.App.4th at pp. 751-752.)

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[3] IHHI appears to have backed away from this claim at oral argument, conceding that the allegations relating to the gun incident do not amount to protected speech.

Similarly, in *Kesmodel v. Rand* (2004) 119 Cal.App.4th 1128 (*Kesmodel*), the Court of Appeal applied the same conduct/communication distinction to permit a tenant's tort lawsuit to go forward against neighbors who falsely claimed he was a "peeping Tom" and secured a citizen's arrest. The court found the neighbors had done more than merely petitioning the police to take action for redress of grievances; instead they were civilly charged with aiding and abetting the commission of an intentional tort. There is a "a qualitative difference 'between malicious *conduct* of a citizen . . . and pure *communication* . . . .'" (*Id.* at p. 1136, fn. 9, original italics.) "The evidence in the present case makes clear beyond dispute that [the neighbor] instigated, encouraged, aided, and assisted the wrongful act by summoning the deputies, falsely asserting [the tenant] had peered into her bedroom, and by making it clear she wanted him arrested when the officers declined to do so themselves." (*Id.* at p. 1141.)[4]

The conduct/communication distinction extends beyond citizen's arrest cases to other areas where "an independent, noncommunicative, wrongful act was the gravamen of the action . . . ." (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1065 (*Rusheen*).)

In *Clark v. Mazgani* (2009) 170 Cal.App.4th 1281 (*Clark*), the Court of Appeal held that a landlord did not engage in a protected activity, for purposes of an anti-SLAPP motion, when she unlawfully evicted a tenant from a rent-controlled apartment by falsely claiming that her daughter intended to move in. The court rejected the landlord's claims that she engaged in privileged communications made in the course of the unlawful detainer action; instead, as the court emphasized, the landlord was sued for her tortious actions in fraudulently evicting the tenant. "'Terminating a tenancy or

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[4] *Kesmodel*, *supra*, 119 Cal.App.4th 1128, involves the litigation privilege (Civ. Code, § 47, subd. (b)), not the anti-SLAPP statute. While the two protections are not identical in every respect, courts have frequently looked to cases involving the litigation privilege to understand the distinction between protected communications and unprotected conduct. (See discussion in *Flatley*, *supra*, 39 Cal.4th at pp. 320-323.)

removing a property from the rental market are not activities taken in furtherance of the constitutional rights of petition or free speech.'" (*Clark*, at pp. 1286-1287.)

Here, IHHI's alleged misconduct involves more than petitioning a governmental body or reporting a crime. The underlying activities — planting a handgun in a vehicle and then using a calling card to make an untraceable 911 call to the police — are not *necessary* to any protected speech or petition and are entirely independent of it. (See *Rusheen*, *supra*, 37 Cal.4th at p. 1065.) As far as the handgun incident is concerned, IHHI has been sued for engaging in "malicious *conduct* of a citizen that aided or promoted a peace officer's unlawful arrest" (*Hagberg*, *supra*, 32 Cal.4th at p. 374). If anything, it is "healthy" to chill such conduct by the threat of a civil action to the extent that it deters the commission of a crime. (*Kimmel v. Goland* (1990) 51 Cal.3d 202, 213 [illegal recording of telephone conversation is noncommunicative conduct].)

Because IHHI has failed to satisfy its burden on the first prong of the SLAPP analysis, Fitzgibbons's complaint is not subject to a motion to strike and our analysis of the merits of his lawsuit ends. (*Clark*, *supra*, 170 Cal.App.4th at p. 1286.) We do not determine whether Fitzgibbons can establish evidentiary support for his claims regarding IHHI's role in the handgun incident. Fitzgibbons has yet to be put to his proof.

C. *The Principal Thrust or Gravamen of Fitzgibbons's Cause of Action for Intentional Interference Does Not Involve Protected Speech or Petitioning by IHHI*

In its opening and reply briefs, IHHI itself concedes that much, if not all, of Fitzgibbons's allegations underlying the cause of action for intentional interference with prospective economic advantage have nothing to do with any protected activity.

For example, the interference cause of action alleges that IHHI orchestrated Fitzgibbons's retaliatory discharge from his position as infection control adviser at the hospital, and introduced and promoted an economic competitor. IHHI points out both of these actions occurred *before* he sent out his e-mail messages: "If this whole thing is

truly over just that 'one email' in May 2005, then what 'wrongful' motive characterized Fitzgibbons's supposed 'discharg[e]' *five months earlier* in January? Fitzgibbons can offer no explanation." (Original italics.) In like fashion, as IHHI shows, Fitzgibbons complains that IHHI dropped his name from a list of contractors around March or April 2005, "*before* Fitzgibbons sent his May 2005 email." (Original italics.)

Fitzgibbons does not specifically allege any retaliatory activity undertaken by IHHI that directly affected his economic relations in the immediate aftermath of his e-mail messages. But even if he did, such actions (cutting off physician referrals to Fitzgibbons, and failing to renew his contract as infection control advisor) fall on the conduct side of the conduct/communications divide, and fail to meet IHHI's threshold showing the complaint entails "[a] cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech . . . ." (§ 425.16, subd. (b)(1)); *Marlin v. Aimco Venezia, LLC* (2007) 154 Cal.App.4th 154, 160-161 [landlord's action in terminating a tenancy is not a protected activity for purposes of the anti-SLAPP statute]; see also *Westlake Community Hosp. v. Superior Court* (1976) 17 Cal.3d 465, 482 [terminating physician staff privileges not a communicative act].)

D. *The Principal Thrust or Gravamen of Fitzgibbons's Cause of Action for Defamation Does Not Involve Protected Speech or Petitioning by IHHI*

As IHHI argues, Fitzgibbons's allegations regarding its alleged defamatory statements are even more obtuse. "The lack of specificity in the Complaint makes it difficult to tell just what exactly Fitzgibbons claimed caused his injury." IHHI characterizes Fitzgibbons's cause of action for defamation as "vague" in the extreme, failing "to allege who said what provably false factual assertion to whom." IHHI finds it "impossible to determine from the face of the pleadings whether IHHI's alleged 'defamatory comments' [citation] or 'false and unprivileged statements' [citation] can be placed in [the] context of Fitzgibbons's earlier missives." IHHI takes Fitzgibbons to task

for failing to provide "*any* detail regarding the alleged defamatory statements in his complaint . . . ." (Original italics.)

We disagree with IHHI's characterization at oral argument of the defamation claim as principally involving a so-called "dust up" over e-mails. As in *Episcopal, supra,* 45 Cal.4th at page 473, IHHI's undefined (and allegedly defamatory) response to the e-mails at most "lurks in the background" rather than at the forefront of the cause of action. Based upon our review of the record, the principal thrust of the defamation cause of action remains IHHI's allegedly unprotected statements leading up to and following the gun incident. IHHI's claim that its protected speech is at issue, based on vague and unspecified allegations of other defamatory statements, at most is incidental to Fitzgibbons's central thrust that he was defamed by being framed.

IHHI cites *Gilbert, supra,* 147 Cal.App.4th 13, for the proposition that it can use a special motion to strike under the anti-SLAPP statute to secure the early dismissal of a defamation claim that is not legally sufficient or supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the plaintiff's evidence is to be believed. But *Gilbert*'s call for specificity in pleading arises only in conjunction with the second prong of the anti-SLAPP statute *after* the moving defendant has met its burden to show that the defamation claim arose from protected activity. Where the principal thrust or gravamen of the defamation claim did not arise from protected activity, we need not consider Fitzgibbons's probability of prevailing. (§ 425.16, subd. (b)(1).)

IV

DISPOSITION

The order denying defendant's anti-SLAPP motion is affirmed. Plaintiff shall recover his costs on appeal.

ARONSON, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

FYBEL, J.